In the Supreme Court of the United States

OCTOBER TERM 1946

No. 973

PIONEER MILL COMPANY, LIMITED (a Hawaiian corporation),
Petitioner-Appellant,

vs.

VICTORIA WARD, LTD., and VICTORIA KATHLEEN WARD,
and
Respondents-Appellees,

THOMAS DUNCAN (alias Thomas Cokett), ABRAHAM KELUKUMOKU KUKEA (alias Ephraim Kelukumoku Kukea), SOLOMON KAHOLOMOANI KUKEA, JOSEPH KALA KUKEA, JAMES KALEIWAHEA, ARTHUR KALEIWAHEA, LOUIS KALEIWAHEA, ELIZA KALEIWAHEA, VIOLET KALEIWAHEA, IRENE KALEIWAHEA, ROSALINE KALEIWAHEA, ALBERT JOSEPH KALEIWAHEA, TERRITORY OF HAWAII, COUNTY OF MAUI, FIRST DOE, SECOND DOE, and THIRD DOE, and all other persons although unknown, having or claiming to have any legal or equitable estate, right, title or interest of any nature in the land hereinafter described, or any part thereof, or any lien or claim with respect thereto, *Respondents.*

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit, and BRIEF IN SUPPORT THEREOF.

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and

THOMAS DUNCAN, et al.,
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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable the Supreme Court of the United States:

The petition of Pioneer Mill Company, Limited, a Hawaiian corporation, hereinafter referred to as the "petitioner", respectively shows to the Honorable Court:

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner seeks a review of a judgment (R. 632-642) of the Circuit Court of Appeals, hereinafter referred to as the "Appellate Court," affirming a decree of sale (R. 301) in a partition suit made by the Supreme Court of Hawaii, hereinafter referred to as the "Territorial Court," which reversed the findings of fact of the Circuit Judge in equity, hereinafter referred to as the "Trial Court," that partition in kind was practicable and could be made without prejudice to the co-tenants. The Appellate Court by their action is perpetrating an obvious injustice and deprivation of property without due process of law on the basis of a supposed inability to review the matter attributable to the ruling in *Waialua Agricultural Co. v. Christian,* 305 U. S. 91.

Petitioner will be prejudiced by a sale of the property because its sugar cane plantation railroad and an important underground irrigation tunnel cross the property. It will cost petitioner over $100,000 to construct detours, based on 1936 costs (R. 553, 567, 582, 591). This sum alone is over three times the appraised value of $29,105 (R. 217, 550, 573-6, 585-590) of the common property including the improvements

and structures on it. Forming connecting links, as they do, in petitioner's large plantation railway and irrigation systems constructed at its own expense, these small sections of rights of way for railroads and water tunnel over the common property are a necessity to petitioner's business and have a value peculiar to it which they would not have to a purchaser (other than petitioner) of the common property. The Territorial Court ordered a sale on the theory that the shares of the respondent co-tenants in the proceeds of sale would probably exceed the value of their purparts upon partition in kind (R. 281). This could only be done at petitioner's expense, which is illegal and inequitable.

The land being partitioned comprises 194.54 acres at Honokowai, Island of Maui, Territory of Hawaii, divided into six non-contiguous parcels stretching a distance of about three and one-half miles from the sea to the mountains, in and above the gulch of the Honokowai Stream (R. 108). The upper parcel is divided into two lots and the lots are numbered 1 to 7 from the sea upwards. Petitioner owns approximately 85% of the land, the appellees and respondents own about 15% (R. 306), or a ratio of 7/8ths to 1/8th shares.

The partition statute (Revised Laws of Hawaii, 1945, chap. 304) directs partition according to the practice of courts of equity and the provisions of the act in enlargement thereof, and empowers the court to sell the whole property only where partition "in kind would be impracticable in whole or in part or be greatly prejudicial to the parties interested."

The case was tried twice before two separate judges in equity (R. 125, 221), they each viewed the property, and each appointed practical men as commissioners in partition under the statutes; at each trial a decree of partition in kind was entered (R. 110, 221), each of the trial judges as well as the commissioners (R. 85, 93, 183, 229) found as a fact from the evidence that it was practicable to partition the property in kind without prejudice to the co-tenants (R. 514, 219). The commissioner on the second trial reported that "division of lands herein is a fair and impartial partition" (R. 244). Each time the Territorial Court, while not having the advantage of a view of the premises, reversed the Trial Court (34 Haw. 686,-R. 133; 37 Haw. 74,-R. 261). On the first appeal the Territorial Court reversed the Trial Court's finding that the improvements, tunnel and railroads on the land were the sole property of petitioner, and remanded the case for further proceedings to redetermine, in view of that holding, (1) whether the property was susceptible of partition in kind, taking into account the value of the improvements on the property, and (2) the water rights appurtenant to the land (R. 159, 160). On the second appeal the Territorial Court admitted that so far as the physical aspects of the property were concerned it was partible in kind (R. 279), but decreed a sale for the reason stated, and holding that the parcels of land awarded the respondents were too small to be used by them, which is contrary to all the evidence on the subject (R. 107, 96-100, 246, 234-240); that the land is situate in a remote country district, which it is not as it is served by a good macadam

road with electricity and water available and only six miles from a town (R. 444, 447); and that the land is of many kinds, which is true (R. 524, Ex. 70) but respondents were awarded their shares in the best lot adjacent to the highway (R. 117, 249) and there is a market for such property (R. 562, 529, 585-6). It is untrue to say the respondents are at the mercy of petitioner because its plantation surrounds the land, it is served by a good highway and other people own homes only a few hundred feet beyond the lots awarded respondents (R. 529). It appears that petitioner is more at the mercy of appellees (R. 219). The Territorial Court applied judicial notice to establish its findings in these matters, not only contrary to the evidence in some instances, but in disregard of the partition statute and prior opinions of the same court requiring proof of claims not admitted by the pleadings.

Prior to this case it was established law in Hawaii as elsewhere, that in partition the value of improvements upon land is the amount by which they enhance its value. In this case it was decided in effect that, in addition to their share of the value of the land and the amount by which the improvements enhanced it, the appellees were entitled to a share of the cost of detouring the land with new sections of the tunnel and railroads (R. 553, 219, 220, 281). This was described by the trial judge—a nuisance and force value; he said that "a sale would not be here an equitable method of partition" (R. 219, 220).

The decree of sale so radically changed the established law of Hawaii that justice was denied the petitioner, the due course of law was violated. Petitioner is about to be deprived of its property contrary to the Fifth Amendment of the Constitution which applies to Hawaii under the Organic Act, sec. 5. It has been decided that even the Legislature cannot take the property of one man and give it to another for private use, even upon full payment of its value, and no more can the court do it without due process, that is by following established law.

Petitioner built the tunnel and plantation employees' houses on the property at its own expense, and developed the land for the purpose of its business. Petitioner operates a 10,000 acre sugar cane plantation in the vicinity of this land. The respondents have been absentee landlords since 1896 when all the land but Lot 1 was leased to petitioner for 20 years (R. 379). Later, the record does not show when though it was around 1908, petitioner took possession of Lot 1 also, and beginning June 30, 1916 when the lease expired, paid rent for it under a written agreement with appellees' predecessors in title who did not sell their shares in the land to petitioner (R. 461, 448). The lease contains a provision that at the end or earlier determination of the term, the "improvements" should be surrendered with the land to the lessors (R. 380). Prior to the end of the lease petitioner's practically wholly owned subsidiary (R. 391) called the Lahaina Agricultural Company, Limited, negotiated with Previer (John Previer was the original

patentee of the land from the government) heirs for the purchase of the land or, in the alternative, a new lease to petitioner. About a month before the old lease expired Lahaina Company accepted in writing the written offer made by one of the heirs, who is styled "agent" of the Previer heirs, for the purchase of all of the land (R. 387). In the years 1917 and 1918 (R. 455) petitioner constructed a tunnel several hundred feet underground through Lot 7, located in the forest reserve, for the purpose of conveying water from two dams built on government land in the Honokowai Stream (R. 434), under a written license from the government (R. 558). This tunnel commences in the gulch some distance above Lot 7 and continues below Lot 7 where the water runs out onto land wholly owned by petitioner. It was not until 1919 that petitioner's subsidiary secured a deed to certain undivided interests in this land; in the meantime the appellees' predecessors in title refused to sign the deed and declared they had not authorized the so-called agent of the Previer heirs to sell their shares. Thereafter (R. 466, 472, 474) petitioner covered by written agreement the renting of the shares of appellees in all of the land, including Lot 1 (R. 461, 448), from the date of expiration of the old lease at approximately four times the rental previously paid (R. 379, 466). Also, in the meantime, in 1917, petitioner constructed camp dwellings for its plantation employees upon Lot 1. During the term of the old lease, petitioner constructed railroads—rails spiked to ties and ballasted—across Lots 2 and 3. These were trade

fixtures. The tunnel and railroads across this land are small sections of larger systems, which will be severed if the lands are sold. The uncontradicted testimony as well as the admissions, at the trial, of appellees' counsel, shows that the railroads and tunnel do not enhance the value of this land, and would be useless, except for scrap values, to a purchaser who did not own the rest of the systems or own water to run through the tunnel. It would be a dry hole in the ground, (R. 428-431, 535, 587, 591).

At the first trial appellees' counsel admitted several times that the tunnel under Lot 7 and the railroads were not improvements and might be a liability, that they were constructed for the plantation's business, and that the appellees did not want the employees' camp houses on Lot 1 (R. 428-431). Appellees' amended answers practically state the same thing (R. 81). Following these admissions the trial judge made a decree (R. 85, 512-516) awarding to petitioner, as part of its share of the property most useful to it, the structures with the rights of way covered by them, and the buildings on Lot 1. After the report of the commissioner was filed making partition in kind except as to three small lots in Lot 1 which the commissioner recommended be sold subject to an upset price to be fixed by the court, to which report no written objections were filed by appellees (R. 516) as required by the partition statute, a final decree of partition in kind approving the commissioner's report was entered (R. 87). Upon appeal the Territorial Court, reversing the trial judge, held that the peti-

tioner was a hold-over tenant of the land under the old lease after it expired in 1916 (R. 151), that the Lahaina Company was a separate entity from the petitioner, that petitioner was a trespasser on Lot 1 at the time it constructed the buildings, and that the structures and improvements were consequently common property of all the co-tenants under the terms of the lease (R. 157). The Territorial Court committed manifest error in this holding, disregarding the admissions of appellees' counsel and their amended pleadings making similar admissions, disregarding the express written contracts leasing the appellees' interests in the land after the old lease expired, and disturbing the findings of fact of the trial judge based on uncontradicted evidence and of the commissioner.

This was contrary to the law that the findings of fact of the Trial Court when supported by the evidence will be affirmed on appeal. It disregarded the law that when only some of the joint lessors under an old lease enter into a new rental agreement of their separate shares of the land, they cannot enforce the covenants of the old lease. All of the joint lessors must join to enforce the covenant, and they did not all appear in the Territorial Court or appeal to it, (R. 125/6, 142). The purchaser of an undivided interest in land cannot enforce a joint covenant to surrender improvements when the purchase was made after the lease expired or after its covenant was breached. The right is not assignable by one of several joint lessors.

At the second trial following the remand of the case, the trial judge determined the water rights to which the land was entitled, fixed the value of the structures and improvements on the land at the amount by which they enhanced its value following the law laid down in a previous case by the Territorial Court (R. 183-221), and decreed partition in kind (R. 247).

Petitioner diverts, for agricultural purposes (R. 548), all the water in the stream, averaging about five million gallons a day (R. 570), on government land at a point above this land (R. 434), into the tunnel at two dams held under government licenses (R. 554, 558). Petitioner owns practically all the land having appurtenant water rights in the stream (R. 567), and leases the respondents' shares of the land in question having similar water rights. The surplus water belongs to the government (R. 595, 599, 215). The owner of water has the right to divert and uses it where he wishes.

Petitioner was awarded on partition the other lots 2, 3 and 4 which are mostly cane land with some waste land; Lot 5 is mostly pasture and takes in the side of a big gulch, 2.5 acres of taro land having appurtenant water rights in the stream, and 0.75 acre of cane land; Lot 6 is used for nothing but might be pasture, and Lot 7 is used for nothing except the underground tunnel (R. 533-547).

There was no evidence of prejudice by partition in kind and no allegation in the pleadings that appel-

lees would be prejudiced thereby. All the evidence on the subject showed that the appellees and respondents would be fairly and squarely treated if they were given a share of the common property of a value equal to their share of the total value of all the property (R. 426, 449, 450, 503, 553).

A Hawaiian statute authorizes the determination of water rights before a water commissioner, but it has repeatedly been decided by the Territorial Court that this statute does not oust jurisdiction of the equity court in a matter before it, to determine water rights. The Territorial Court in remanding the case on the first appeal instructed the trial judge to determine the water rights in connection with his land, which he did. On the second appeal the Territorial Court set aside the trial judge's determination and said the water rights should be determined under the water commission statute. This is a departure from the settled law, which the Appellate Court failed to inquire into, dismissing the matter under the *Waialua v. Christian* case, as if it had no power to correct an obvious error of the Territorial Court.

The action of the Appellate Court in this case involves the construction of federal statutes. Petitioner respectfully contends that the rule laid down by this Court in *Waialua Agricultural Co. v. Christian,* 305 U. S. 91 supra, 107, 109, 83 L. ed., 60, 71, holding that the power of the Circuit Court of Appeals to reverse any ruling of the Supreme Court of Hawaii on law or fact should be exercised only in cases of manifest error, should be definitely modified and over-

ruled. The Territorial Court is created by Federal statute (48 USCA, s. 631), it is not like a state court representing the people of the state; the judges of the Territorial Court are appointed by the President with the approval of the Senate of the United States, like a Judge or Justice of the Federal courts; the same Federal statute, Act of April 30, 1900, C. 339, 31 Stat. 157 as amended (48 USCA, ss. 631 and 641) creates both the Territorial Court and the United States District Court in Hawaii; the Territorial Court is to all intents and purposes a Federal court presiding over the Territory which has no state independence; the Territorial Court is not entitled under the Federal statute to the same freedom of action as the Appellate Court of a state. The Appellate Court construed the *Waialua* rule referred to as compelling it to accept the decision of the Territorial Court thus virtually depriving a litigant by judicial decision of the right given by Federal statute and making the disposition of an appeal almost a mechanical, rather than a judicial act.

The Appellate Court was obliged but *failed* to ascertain what the law of Hawaii was governing real property rights in this case when petitioner acquired or obtained the right to acquire its undivided interest in the common property, and to see whether such law was applied by the Territorial Court.

The Appellate Court misconstrued the Federal judicature act (28 USCA, sec. 225) granting appeals from *final* decisions of the Territorial Court to the Circuit Court of Appeals, and refused to consider a prior

opinion of the Territorial Court in this case because no appeal was taken from it when such prior decision remanded the case to the Trial Court for further judicial action and for further evidence. In a very similar case this Court has previously decided that such a decision is not appealable because it is not final.

The Appellate Court failed to determine what the settled law of the Territory was, concerning the matters involved in this suit prior to the decision in this case which changed Territorial law and misapplied or did not apply at all earlier decisions of the Territorial Court and changed the law of the case to such an extent as to deprive petitioner of its property without due process under the Fifth Amendment of the Constitution.

The Hawaii appeal statute allowing appeals from circuit judges in equity to the Territorial Court provides that on appeal the case may be entirely reconsidered but shall be decided upon the evidence adduced in the Trial Court, and that no further evidence shall be admitted except newly discovered evidence, in this case there was none. The Territorial Court in several instances noted above on the second appeal, made direct findings based on judicial notice. There are numerous holdings in partition cases that judicial notice does not take the place of proof by evidence which is required by partition statute in order to establish facts to authorize a sale instead of partition in kind.

Petitioner petitioned the Appellate Court for a rehearing on the ground (*inter alia*) that the first opinion of the Territorial Court was not a final and appealable decision. The rehearing was denied.

The Appellate Court disregarded the question of necessity or nuisance value involved here. The necessities of a party interested in land cannot be taken advantage of in determining its fair value.

The Circuit Court of Appeals held that the question of whether the land could be partitioned in kind without great prejudice to the owners was a question of law and fact, while the same Appellate Court, in a previous case coming from Alaska, held that such a question was one of fact. It failed to consider in adjusting the equities of the owners of 1/8th of the land that they should be so adjusted as not to be detrimental to the owner of the remaining 7/8ths. The judicial code requires the Appellate Court to give judgment after an examination of the entire record before the court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties. In failing to review the first opinion of the Territorial Court the Appellate Court did not follow this section.

B.

STATEMENT OF JURISDICTION.

Judgment herein was entered in the Appellate Court on November 14, 1946 (R. 642), petition for rehear-

ing was denied December 11, 1946 (R. 643), and time for filing this petition expires March 11, 1947 under the Judicial Code (28 USCA, sec. 350). The Judicial Code, sec. 240, amended (28 USCA, sec. 347a) gives this Honorable Court jurisdiction upon filing petition for a writ of certiorari prior to the last mentioned date. The Appellate Court stayed the mandate of that Court pending presentation of this petition.

C.

QUESTIONS PRESENTED AND REASONS FOR ALLOWANCE OF WRIT.

This petition should be granted because it involves the construction and application of the Fifth Amendment of the Constitution and federal statutes. The rule similar to the rule of state decisions laid down by this Court in *Waialua v. Christian,* supra, should be reversed or modified in its application to decisions of the Territorial Court. The present rule has practically nullified the Act of Congress granting appeals from the Territorial Court to the Appellate Court. The situation is more analagous to an appeal from one federal court to another federal court. The Territorial Court is merely a branch of the Federal Government, its Justices are appointed, paid and controlled by the Federal Government. There is no State independence or similarity to it. Even the Hawaii legislature is subject to control of the Congress. The Appellate Court is just as capable of determining Hawaii law as the Territorial Court. They are in fact, both federal courts.

In any event the Appellate Court was obliged, but failed in this case, to determine what the settled Hawaii law was governing the real property rights in this case, and to see whether that law was applied.

This case involves the construction of the federal judicature statute (28 USCA, s. 225) giving a right of appeal to the Appellate Court from a final decision of the Territorial Court, because the former Court erroneously failed to review the first opinion of the Territorial Court in the determination of title to improvements and structures and the rights of way, or to whom they should be awarded on partition. The first opinion was not final for the reasons above stated; it required further judicial action and taking of evidence by the Trial Court.

The Hawaii partition statute makes the general rules of equity in partition cases applicable and the powers under the statute also applicable in aid thereof. This statutory provision takes this case out of the rule in the *Waialua v. Christian* case. The Appellate Court should have determined the general rule applicable to great prejudice to the owners of the property by partition in kind, and should have applied it here as it affected an improver of the common property.

There has been a departure by the Appellate Court from the settled law in some cases and conformity thereto in other cases. Manifest error was committed by the Territorial Court in this case. It is submitted that the petitioner's rights have been inequitably dealt with; that its ownership of the property is seven times

greater than that of the appellees and respondents; that petitioner's property should not be sold contrary to its wish unless the necessity for such a sale is established, which has not been done, pursuant to the partition statute which alone authorizes a sale. A sale will force petitioner to pay a nuisance value by reason of its necessity to keep its own property and structures made at its own expense. It will unjustly enrich the other co-tenants who have done nothing to enhance the value of the common property. They as absentee landlords have participated in the enhanced value and development of the property. They have not been injured thereby. The order of sale deprives petitioner of its land without due process of law, contrary to the Constitution. The findings of fact of the Trial Court supported by conflicting or uncontradicted evidence or admissions should be affirmed on appeal. That has always been the law in Hawaii, but it was not followed in this case. A view of the property is of greatest importance to a decision. Partition was made by practical men. The Trial Court had jurisdiction of the water rights and decided them; unless the decision is wrong it should be affirmed on precedent. There is a difference of decisions by the Appellate Court on a similar question, namely that the necessity for a sale in partition is a question of fact. This situation calls for relief and for the allowance of this petition.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the Circuit Court of Appeals of the

United States for the Ninth Circuit, commanding that court to certify and send to this Court a full and complete transcript of the record and of the proceedings of that court had in this case, numbered and entitled on its docket as "No. 11216, Pioneer Mill Company, Limited, a Hawaiian corporation, Petitioner-Appellant, v. Victoria Ward, Ltd., Victoria Kathleen Ward, Appellees, Thomas Duncan, et al., Respondents," and that the judgment of that court be reversed by this Court and for such further relief as to this Court may seem proper.

Dated at Honolulu, T. H., January 16, 1947.

Respectfully submitted,
PIONEER MILL COMPANY, LIMITED,
By URBAN E. WILD,
Counsel for Petitioner.

SMITH, WILD, BEEBE & CADES,
Of Counsel.

CERTIFICATE OF COUNSEL.

The undersigned counsel for Petitioner hereby certifies that the foregoing petition is well founded in his judgment and is not interposed for delay.

Dated at Honolulu, T. H., January 16, 1947.

URBAN E. WILD,
Counsel for Petitioner.

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OCTOBER TERM 1946

No.

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VICTORIA WARD, LTD., and VICTORIA KATHLEEN WARD, *Respondents-Appellees,*
and
THOMAS DUNCAN, et al., *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The foregoing petition contains a statement of the grounds of jurisdiction, a statement of the case, and the dates when judgment was entered and the petition for rehearing denied.

I.

OPINIONS OF COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit is reported in..... Fed. (2).....(R. 632-641). The opinions of the Supreme Court of Hawaii are reported in 34 Haw. 686 (R. 133), 37 Haw. 74 (R. 261), on motion to dismiss appeal 37 Haw. 165 (R. 334).

II.

STATEMENT OF FACTS.

A statement of facts is contained in the foregoing petition with references to the pages of the record.

III.

SPECIFICATION OF ERRORS.

1. The Appellate Court (Circuit Court of Appeals) erred in holding that their power to reverse rulings of the Territorial Court (Supreme Court of Hawaii) on law or fact was limited to manifest error.

2. The Appellate Court was obliged by Federal statute and decisions of this Court but failed to determine what the settled law was applicable to this case governing real property rights, and to see whether that law was applied.

3. The Appellate Court erroneously construed the Judicial Code, sec. 128, amended (28 USCA, s. 225)

which gives a right of appeal to that Court from the Territorial Court only from final decisions. The first decision of the Territorial Court in this case (34 Haw. 686, R. 133) should have been reviewed by the Appellate Court on the current appeal from the final decision (37 Haw. 74, R. 261, 301) which brought up for review all prior interlocutory rulings; the first decision was not final and appealable when rendered.

4. The Appellate Court erred in sustaining the opinions of the Territorial Court based on some of its prior decisions and in declining to follow the law applicable to this case announced in the Territorial Court's other decisions.

5. The Appellate Court erred in not affirming the first decree of the Trial Court holding that partition in kind of the property was practicable and could be made without great prejudice to the owners, partitioning the property, and awarding to petitioner the structures and improvements made by it and the rights of way therefor.

6. In the alternative to error numbered 5 above, the Appellate Court erred in not reversing the decree of sale of the property made by the Territorial Court, and in not affirming the second decree of the Trial Court making partition in kind.

7. The decree of sale deprives petitioner of its land without due process of law, contrary to the Fifth Amendment of the Constitution.

8. The Appellate Court erred in not deciding that the Trial Court had jurisdiction of water rights ap-

purtenant to the land, and correctly decided such rights; and that the Territorial Court erred in reversing the holding of the Trial Court with respect thereto.

9. The decree of sale erroneously awards the cotenants other than petitioner a nuisance value by reason of the necessity of petitioner requiring rights of way for its utilities over the property, in addition to their shares of the fair value of the property, and disregards the settled law of Hawaii and elsewhere that enhanced value is the rule for determining the value of improvements and structures upon common property.

10. The Appellate Court's ruling in this case, that the question whether property can be partitioned in kind is a question of law and fact, is contrary to its own prior ruling in another case that it is a question of fact.

IV.

THE ARGUMENT.

1. THE APPELLATE COURT'S POWER TO REVIEW RULINGS OF LAW AND FACT WAS NOT LIMITED TO MANIFEST ERROR.

Since this Court's decision on November 7, 1938 in *Waialua Agricultural Co. v. Christian,* 305 U. S. 91, 109, it has been the consensus of opinion in Hawaii that the Appellate Court would not reverse the Territorial Court on a question of fact or law not in conflict with the Constitution or statutes of the United States.

Walker v. O'Brien (9 CCA 1940), 115 F. 2d 956, 957:

> "Therefore, unless manifestly erroneous, it must be accepted as correct. Waialua Agricultural Co. v. Christian, supra."

In our case the Appellate Court said:

> "It is clear that these specifications present questions of local law only. Our power to reverse rulings of the territorial court on law or fact is limited to cases of manifest error" citing *Waialua* case.

The Territory of Hawaii is a branch of the Federal Government, it has no such independence as a State enjoys. The Justices of the Territorial Court and the circuit court judges are appointed and paid by the Federal Government in the same way the United States District Court judges are appointed under the same Federal statute Act of April 30, 1900, C. 339, 31 Stat. 141 et seq. amended (48 USCA, ss. 631, 634, 641). The Governor and certain executive officers of the Territory are also appointed by the Federal Government (48 USCA, ss. 531, 534). The legislative power is not only subject to the control of the Congress but it may itself legislate directly for the local government.

Inter-Island Steam Nav. Co. v. Hawaii, 305 U. S. 306, 83 L. ed. 195,

> " 'Congress may not only abrogate laws of the Territorial legislature but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and

a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments.' "

The Congress did legislate directly on the point. The Judicial Code, sec. 128, amended (28 USCA, s. 225)

"(a) *Review of final decisions.* The Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal . . . final decisions . . .

"Second. In the United States district courts for Hawaii . . .

"Fourth. In the Supreme Courts of the Territory of Hawaii . . . in all civil cases, civil or criminal wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000.00, . . ."

States' Rules of Decision statute, 28 USCA, sec. 725, has no application because it refers to states and to rules of decision in trials at common law. This is an equity action. The principles of equity jurisprudence are the same throughout the United States except where altered by statute. *Russell v. Todd,* 309 U. S. 280, 287, 84 L. ed., 754, 759, in stating that the rules of state decisions statute did not apply in equity cases said:

". . . but applies as well to rules established by judicial decisions in the states as those estab-

lished by statute. Erie R. Co. v. Tompkins, 304 U. S. 64."

The Judicial Code, sec. 269 amended, 28 USCA, sec. 391, provides with respect to United States courts,

> "On the hearing of any appeal, certiorari . . . in any case . . . the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

This Court, in *Waialua Agricultural Co. v. Christian,* supra, imposed an additional condition upon appeals from the Territorial Court which the Congress thought well not to impose in saying:

> "Insofar as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the rule of the Territory."

West v. American Tel. & Tel. Co., 311 U. S. 223, 236, 85 L. ed., 144, stated the reason for applying the rules of state decisions act:

> ". . . But the obvious purpose of s. 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free

> to choose their own rules of decision whenever the highest court of the state has not spoken."

In Hawaii, the Territorial Court and the United States District Court are both Federal courts and there was no need for the Congress to make, and it did not make, any provision to avoid conflicting systems of law. The Congress has not stated which court is the final arbiter of what is Territorial law but has allowed an appeal from both courts to the Appellate Court without restrictions as are placed on appeals from State courts.

In cases where any new question arises, this Court said, in *Burgess v. Seligman,* 107 U. S. 20, 27 L. ed., 359, 365,

> ". . . But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence."

In our case the Appellate Court said:

> "On the appeal here appellant's specifications of error deal for the most part with various aspects of its claim that the property is susceptible of partition in kind without prejudice to the cotenants, and that a sale would be highly inequitable to it, particularly because of the nuisance value of the segment of the water tunnel passing under Lot 7. Other objections relate to the Court's disposition of the subject of water rights, already sufficiently discussed in footnote 5 above, and to the effect of the decree in the land court proceeding. . . ."

The Appellate Court then said it was without power to consider such alleged errors except in cases of manifest error. The *Waialua* case in this respect should be overruled by this Court. The reasons urged here were not discussed or dealt with in the opinion of this Court in that case. The Waialua decision seems contrary to the Federal statutes.

There is ample reason why petitioner's appeal should have been granted which was not considered by the Appellate Court. The Territorial Court did not follow its own decisions in equity cases, and did not apply general equity principles that were applicable. If the *Waialua* case is not overruled or modified, dismissal of appeals by the Appellate Court from the Territorial Court will become a mechanical act.

The Hawaii partition statute, set out in Appendix A hereto, provides, sec. 12,450:

> ". . . for a partition of the property, according to the respective rights of the parties interested therein, and for a sale of the same or a part thereof if it shall appear that a partition cannot be made without great prejudice to the owner. The circuit judges . . . in equity . . . shall have power, in any suit for partition, to proceed according to the usual practice of courts of equity in cases of partition, and according to the provisions of this chapter in enlargement thereof."

The act makes the usual practice of equity courts in such cases applicable. The Appellate Court was not bound by the decision of the Territorial Court but should have applied the usual equity principles,

and should have looked beyond the latter court's prior decisions; it did not do either.

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2. THE APPELLATE COURT WAS OBLIGED, AND FAILED, TO DETERMINE THE SETTLED LAW APPLICABLE, AND TO SEE WHETHER IT WAS APPLIED.

The federal statutes cited require the Appellate Court to exercise its functions as an appellate court, and the decisions of this Court require it. With respect to state law even, this Court said, in *West v. American Tel. & Tel. Co.*, supra, 311 U. S. 223, 236,

> "And the rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute."
>
> p. 237. "State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, . . ."

Russell v. Todd, supra, 309 U. S. 280, 287:

> "This suit being in equity, brought in a federal district court, the question decisive of this case is what lapse of time will bar recovery. . . . The Rules of Decision Act does not apply to suits in equity."

For example, the Territorial Court decided in *Nahaolelua v. Kaaahu*, 10 Haw. 662, 663, that in a partition suit in equity it is *well settled* that the amount to be allowed for improvements is not their cost, but rather the increased value of the premises due to the improvements. The same was held in *Brown v.*

Holmes, 19 Haw. 268. In the *Waialua* case from Hawaii, this Court said, at 305 U. S. p. 111,

> "The lower court considered it necessary to apply here the rule that the occupant of the land of another was entitled to be paid as compensation for improvements, a sum equal to the amount by which the improvements increased the value of the property, . . . It is not always necessary so to penalize an innocent improver. If he is a tenant in common, partition may be made so as to set apart to him the portion improved. . . ."

In *United States v. Honolulu Plantation Co.* (9 CCA), 122 F. 581, 582, in a condemnation case, the court refused to consider the value of land in conjunction with other land owned by the plantation, and said, p. 585:

> "That the compensation . . . must be measured, not by its value to any particular person, but by the market value of the land . . . is established by the authorities, a few of which we add; . . ." (Authority).

United States v. Chandler-Dunbar W. P. Co., 229 U. S. 53, 80:

> "A 'strategic value' might be realized by a fixed price by the necessities of one person buying from another, free to sell or refuse, as the price suited. But in a condemnation proceeding the value of the property to the government for its particular use is not a criterion. The owner must be compensated for what is taken from him; but that is done when he is paid its fair market value for all available uses and purposes." (Authority).

If the property is sold, petitioner must pay the "strategic value" to keep its own property or construct detours. A sale will punish an innocent improver. The Appellate Court refused to ascertain and apply the correct rule in this case.

Brown v. Cornwell, 20 Haw. 457, 462:

> "The authority of courts, in suits for partition, to order a sale of the land . . . rests entirely upon statute."
>
> p. 464. "That land sought to be partitioned cannot be divided in kind without great prejudice to the parties is a material allegation, and, unless admitted, must be proved. Upon that issue a defendant is entitled to adduce evidence."

The pleadings of appellees did not allege "great prejudice" (R. 41, par. 14; R. 46, par. 14; R. 52, par. 14). They merely allege that the lands "are not susceptible to be partitioned in kind." They offered no evidence of prejudice. The first trial judge after hearing the evidence and viewing the property (R. 441) said:

> "In this case those desiring a sale have not sustained burden of proof and the impracticability of a division in kind; nor have they proven that a partition in kind will be greatly prejudicial to the interests of the co-tenants; or even greatly prejudicial to their own interests. From the evidence . . . it is, to the mind of the Court, at least, clearly apparent that a partition in kind can be made;" (R. 514).

The trial judge at the second trial, viewed the property (R. 551), heard the evidence and made a similar finding. He said:

> "A sale would not be here an equitable method of partition for it would bring to bear nuisance and force factors" (R. 219, 220).

While on appeal the Territorial Court

> "shall have power to review, reverse, affirm, amend, modify or remand for new hearing in chambers, such decision . . . Every such appeal shall be taken on the record and no new evidence shall be introduced in the Appellate Court;" except newly discovered evidence. (Revised Laws of Hawaii 1945, s. 9505.)

It is settled law in Hawaii that the findings of fact of the trial judge in equity if supported by evidence, or based upon conflicting evidence, or the credibility of witnesses shall not be reversed on appeal (*Ishida v. Naumu,* 34 Haw. 363, 374; *Sumner v. Jones,* 22 Haw. 391, 394). It is only where the findings of the trial judge "have no evidence for their support" that they will be reversed (*Robinson v. McWayne,* 35 Haw. 689, 739).

The findings as to the ownership of the improvements and structures should have been affirmed on appeal, based as they were on appellees' amended answers alleging that the structures were not improvements (R. 81), and their admissions at the trial to the same effect and that they did not want the camp buildings placed on Lot 1 by petitioner (R. 428-431).

The complaint is that the Appellate Court should have determined all these questions of law to see what the *settled* law was, and should have examined the facts on this appeal. It said it had no power to do so for the reason above stated. The Appellate Court erred.

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3. THE APPELLATE COURT MISCONSTRUED THE JUDICIAL CODE ALLOWING APPEALS ONLY FROM FINAL DECISIONS OF THE TERRITORIAL COURT.

The Appellate Court refused to review the first opinion of the Territorial Court in this case (34 Haw. 686, R. 133). When this case was brought up on appeal from the final decision and decree of the latter court reported and set out 37 Haw. 74 (R. 261, 301), all interlocutory rulings challenged by petitioner-appellant should have been reviewed. The first opinion referred to was not final, it remanded the case for further judicial, not ministerial, action. It instructed the Trial Court to find the value of the improvements, to determine water rights, and whether the land could be partitioned in kind without prejudice to the owners. Under the Judicial Code, sec. 128 amended (28 USCA, sec. 225) cited above, appeals are allowed only from final decisions of the Territorial Court.

> *Green v. Fiske,* 103 U. S. 158, 26 L. Ed., 485, 486:
>
> "There are, still, questions in which the parties have each a direct interest, and they must be determined judicially before the relief has been granted which the suit calls for.

> "Here, however . . . the court must act judicially in making the partition it has ordered. What remains to be done is not ministerial but judicial. The law has presented no fixed rules by which the officers of the court are to be governed in the performance of the duty assigned to them. The court is still to exercise its judicial discretion . . . until it has finally settled and determined on the details of the partition, if made in kind, or directed a sale by the ministerial officers and prescribed the rules for a division of the proceeds."

The decree was held not to be final.

The Ninth Circuit Court of Appeals, in *Cole v. Rustgard,* 68 F. 2d, 316, said:

> "The test of finality of a decision other than in the excepted cases is whether an affirmance by the appellate court would end the suit and leave nothing for the lower court to do but execute the decree. Baxter v. Bevil Phillips & Co. et al., (D.C.) 219 F. 309, 311. Judgment or decree which leaves the rights of the parties affected by it undetermined and open to further litigation is not a final decision. Loflin et al., v. Ayres, et al. (C.C.A.) 164 F. 841."

Elder v. M'Claskey (C.C.A.), 70 F. 529-557. Certiorari denied 163 U. S. 685. A partition decree was entered settling the interests of the parties, ordering partition, and appointing commissioners to make the same. The court expressly reserved all questions as to improvements and accounting for rents and profits.

> ". . . The question of the finality of decrees is not free from difficulty, under the decisions of the Supreme Court, as Mr. Justice Brown points

out in the case of McGourkey v. Railway Co. 146 U. S. 536, 545, 13 Sup. Ct. 170. The general rule that the learned justice lays down in this, the last expression of the supreme court on the subject, is as follows:

"'It may be said in general that if the court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it refer the case to him as a subordinate court, and for a judicial purpose, as to state an account between the parties, upon which a further decree is to be entered, the decree is not final.'

"Judged by this standard, the decree of 1891 was plainly not final. Neither the character of the partition nor the accounting was settled by this decree. Each was dependent on further judicial action of the court, in approving or disapproving the action of its judicial subordinates. . . ."

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4. THE APPELLATE COURT ERRED IN SUSTAINING SOME AND IN DECLINING TO FOLLOW OTHER OPINIONS OF THE TERRITORIAL COURT.

In its decision the Appellate Court considered some of the previous decisions of the Territorial Court settling law in Hawaii appertaining to partition, and it not only declined to follow, but did not discuss in its opinion, other decisions of the Territorial Court.

Under the partition statute set out in Appendix A, sections 12450 and 12456, the court is authorized to

order a sale only where partition is impracticable or cannot be made without great prejudice to the owners. This means all the owners. Section 12453 of the same statute provides that all matters in any pleading with respect to the claim of any party filing the same, which are not inconsistent with any other pleadings shall be taken as admitted but

> "Wherever there is any conflict between the claims of the petitioner and any respondent . . . as disclosed by their respective pleadings, the same shall, without further pleading, be taken as framing an issue;"

Section 12462 empowers the court to appoint a commissioner to make partition. Upon the filing of his report, the parties may file any objections thereto, and if filed, they shall be heard.

The amended petition (R. 64, par. XI) alleged that petitioner and the Lahaina Company while in possession of the lands, had made the improvements and structures. Appellees' amended answers (R. 81) alleged that the structures were not improvements for the purpose of enhancing the value of the land and were constructed solely for the benefit of the petitioner. Upon these pleadings, and appellees' admissions (R. 428-431) that the structures were not improvements and they did not want the buildings (R. 428-431), the uncontradicted evidence that the property could be divided in kind without prejudice to any of the cotenants (R. 426, 449-450, 503-506, 552-553), and the commissioner's report (R. 93), the Trial Court decreed partition in kind and awarded to peti-

tioner the land upon which the structures and buildings were made (R. 514, 85-92, 110). These admissions show that the structures were not "improvements" within the terms of the lease of 1896. Petitioner made an express written contract with appellees' predecessors in title for a tenancy of their shares of the common property from June 30, 1916, the date when the lease expired (R. 466, Ex. C). Miss Ward bought the share of Henry P. Robinson referred to in this exhibit. The agreement for a continued tenancy of Mrs. Ward's share is shown in (R. 472, Ex. H) and her reply (R. 474). Mrs. Ward's share was acquired by Victoria Ward, Ltd. These subsequent agreements also covered Lot 1 (R. 461, Ex. A). The exhibit speaks of 26.85 acres of land makai (below) the government road. It again speaks of 15¼ acres of Lot 1 (R. 461) and this is the same land referred to by witness Clarence Brown, in surveying that area in Lot 1 (R. 448).

The old lease of 1896 (Ex. F, R. 379, 380) provides for surrendering improvements at the end or earlier termination of "this term". This expression could not be applicable to a later term under an implied holding open.

The Territorial Court was clearly wrong and ignored these facts altogether in holding that petitioner was a trespasser on Lot 1 when it constructed the camp buildings in 1917 (R. 152) and was a hold-over tenant of appellees' shares in the property when it constructed the tunnel in 1917 and 1918 (R. 151). The trial judge's decree directing partition in kind and awarding the petitioner the lands upon which the

structures and buildings were made, should have been affirmed under the decisions of *Ishida v. Naumu,* 34 Haw. 363, 374 supra; *Sumner v. Jones,* 22 Haw. 391, 394, supra.

Appellees' counsel and the Trial Court acted upon the theory that the structures were not improvements, and that appellees did not want the camp buildings.

Ramos v. Espinola, 29 Haw. 587, 593 (citing from the Ninth Circuit Court of Appeals in 146 F. 695 at 702) at page 593 said:

> " 'It is unnecessary to inquire whether or not this was the correct theory. Counsel acted upon it from first to last, and the court doubtless accepted the issue as it was presented, and so decided it. It would manifestly be unfair for us to approach the question from any other point of view.' " (Authority).

The Appellate Court declined to consider these facts and settled law of Hawaii.

Despite the partition statute cited above, requiring proof of facts which are not admitted in the pleadings, the Territorial Court supplied judicial notice to take the place of proof to establish the necessity for a sale. There is no testimony to show that the co-tenants will be prejudiced by partition, it is the reverse (R. 219), but the Territorial Court said that the shares of some of the respondents were small. That is true, but they are not too small to be used, as shown by the commissioner's report, and maps above referred to (R. 107, 99-101), and in that case the small lots were ordered sold subject to the approval of the court,

so that the owners would be protected (R. 91). The commissioner at the second trial awarded practically the same lots to the respondents owning the small shares (R. 246, 237-239). All these lots are adjacent to the government highway. They are not so confined within petitioner's plantation as in any way to hamper the free use and enjoyment of the property awarded the respondents. It is apparent that a sale was ordered so that the respondents would get a share of the nuisance value of the property to petitioner, in addition to their fair share of the proceeds representing the value of their shares in the common property. Miss Ward said she would bid up to $30,000 but not beyond that sum (R. 488), and that she thought the property was worth $30,000 (R. 476). Appellees are not entitled to share in the nuisance value to petitioner in addition. Appellees received the best portions of the property as their shares. Miss Ward purchased her share in 1929 (R. 218) after a previous partition suit, which was discontinued, of the same land about 1924 (R. 183), and Victoria Ward, Ltd. secured its interest pending this suit. Petitioner acquired its interest from the Lahaina Company in 1924.

In *United States v. Chandler-Dunbar W. P. Co.*, supra, 229 U. S. 53, 80, the "strategic value" of $15,000 was held altogether speculative and not based on market value for all reasonable uses and demands. Strategic value was disapproved in *United States v. Honolulu Plantation Co.*, supra (9 CCA) 122 F. 581-582, where the plantation showed that another portion of its plantation irrigation water was available for

the tract of land in question and that it had a pumping plant to take care of it.

> "Those matters have no connection with the value of land the government sought to take; and yet the direct tendency of the coupling of such heavy expenditures by the company upon its plantation with the question of value of 561.2 acres in question may very readily have been to enhance the latter in the minds of the jury."

In *McGovern v. New York,* 229 U. S. 363, 371, with reference to the value of a reservoir site to the government, the Court said:

> "It is just this advantage that a taking by eminent domain excludes."

The Territorial Court in its second decision supplied judicial notice to take the place of proof that the respondents' shares in the proceeds of sale of the property would probably exceed the value of their respective shares of the land. That was arrived at by a process of deduction and speculation that the respondents would obtain a share of the nuisance value.

Wight v. Ingram-Day Lumber Co. (Miss.), 17 So. 2d, 196, 197, the court referring to the partition suit of *Stern v. Great S. Land Co.,* 148 Miss. 649, 114 So. 739, 740 said:

> "It was held that such a situation was 'self-evident' and required no proof . . . The case turned, therefore, upon facts supplied by judicial notice. It was stated in Mitchell v. Cline, 84 Cal. 409, 24 P. 164, 166, 'whether or not a partition can be made without great prejudice to the owners is a

question of fact, the decision of which is not aided by judicial notice of any fact or circumstance not proved.' " (Authority).

East Shore Co. v. Richmond Belt Ry., 172 Cal. 174, 155 P. 999, 1002:

"The presumption is that land held in common can be equitably divided . . . It is only where the contrary 'appears by the evidence' that a sale may be ordered. . . . The burden of proof to show such prejudice rests on him. . . ."

As to the report of commissioners:

"The court will rarely interfere with the action of commissioners . . . because it prefers to rely on their judgment as practical men who have been selected on account of their ability and experience, and who have, upon personal inspection, made themselves acquainted with the property in question." (40 Am. Jur. 67, sec. 80.)

This statement applies to the first trial judge himself, who stated that he had had a considerable number of proceedings in partition involving all kinds of lands similar to those here (R. 364).

Exceptions to a commissioner's report must be taken before it is approved (3 Am. Jur. 127, sec. 395). The grounds of such objection must be stated so as to call the court's attention to the point, and the Appellate Court will consider only such grounds of objection as are specific. 3 Am. Jur. 41, sec. 263; *Pennsylvania R. Co. v. Minds,* 250 U. S. 368, 375. Objection to the findings by the Trial Court without

a jury will not be considered on appeal unless they are raised and reserved in the trial court (3 Am. Jur. 128, sec. 396).

Union Bleachery v. U. S. (4 CCA), 79 F. (2d) 549, 550-551,

> " 'Exceptions, to be of any avail, must present distinctly and specifically the ruling objected to.' "
>
> "It is equally well settled that we will not review the findings of fact . . . unless the attention of the court below has been directly drawn thereto . . ."

Brown v. Cornwell, 20 Haw. 457, supra, 461,

> "The appellants excepted to the report . . . The exceptions were overruled, and a final decree was entered by which the commissioner's return was approved; . . ."

(p. 464):

> "His report was in the nature of an expert opinion, and merely advisory. It had no more force than the testimony of a witness. Not being controverted by other evidence, it furnished a sufficient basis for a finding by the court in accordance with the commissioner's conclusion. (Authority). The defendants in this case were given an opportunity to offer evidence on the point after the report of the commissioner came in. They had no cause for complaint in this connection."

Robinson v. McWayne, supra, 35 Haw. 689, 715,

> "The purpose of initial pleadings are to advise the court and adverse parties of the cause of

action upon which the pleader relies and to define the issues . . ."

Brown v. Holmes, supra, 19 Haw. 268, was a partition suit of a leasehold for the life of a man then 80 years old. It comprised lands of many types, including those in the present case. The commissioner and trial judge found that the land by itself, including fisheries and water rights, could be partitioned in kind without great prejudice; but on account of it being merely a leasehold and the age of the life tenant, the cost of surveying, subdividing and fencing the various extensive lots of grazing land would be unwarranted.

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5. THE APPELLATE COURT SHOULD HAVE EXAMINED THE FIRST DECREE OF THE TRIAL COURT.

The first decree of the Trial Court, based on the pleadings, evidence and admissions of counsel for appellees, and the commissioner's report, should have been affirmed for the reasons above stated. The Appellate Court erred in not examining these reasons, and the law applicable to the case, and virtually denied petitioner's right to a hearing on appeal in that court.

It was the province of appellees to have shown by evidence, the manner in which they would be prejudiced by partition in kind. Their only expert witness admitted that they would not be so prejudiced (R. 502-506).

Petitioner through its subsidiary land company, the Lahaina Company, negotiated to purchase, or for a

new lease of the property, prior to the expiration of the old lease in 1916. The appellees' predecessors in title either backed out of the transaction or did not authorize the so-called agent of the Previer heirs to sell their shares; they did not sign the deed to Lahaina Company, it was not executed until 1919. But in any case, petitioner had grounds for believing that it had a right to acquire title to the land before it built the tunnel; that it did build it in good faith, as was brought out by appellees' cross-examination of petitioner's witness (R. 457). That fact is not contradicted. When a party believes that he has acquired title, or the right to acquire it, he is not to be penalized by being deprived of his improvements. In this case the Territorial Court not only penalized petitioner by not giving it its structures and improvements, but added coals of fire by imposing a nuisance value.

In the *Waialua* case, supra, 305 U. S. at page 111, this Court said:

> "It is not always necessary so to penalize an innocent improver. If he is a tenant in common, partition may be made so as to set apart for him the portion improved."

And this Court cited with approval *Highland Park Mfg. Co. v. Steele* (4 CCA), 232 F. 10, 34,

> ". . . If, however, by reason of the fact that the grantee, in the bona fide belief that he has, by his deed, acquired a good and valid title to the entire tract of land conveyed, places improvements upon it, the court in its decree directing partition, while preserving the rights of the cotenant, will direct the partition to be so made as

to conserve the equities of all parties, both by providing for compensation for the betterments, and, if practicable, and without prejudicing the rights of the other co-tenants, directing the allotment of the part upon which improvements have been made to the tenant who made them."

Hayes v. Davis, 307 Ill. App. 440, 30 N. E. 2d, 521, 522-523;

Walker v. Eller (Ark.), 10 S. W. 2d, 14, 17.

Cochran v. Shoenberger, 33 F. 397, 401,

". . . If one of the parties must have, or ought to have, a particular purpart because of its contiguity and relation to his other property, justice requires that it should be assigned to him at what it is really worth,—its fair market value if offered to others not so circumstanced—and he should not be coerced by the other party, by means of bidding, into paying more."

Appellees were absentee landlords; Miss Ward had seen the property only three times in her life (R. 485, 604, 613). They lived in Honolulu on another island (R. 471, 474).

Ford v. Knapp, 102 N. Y. 135, 6 N. E. 283, headnotes,

"Defendants bought one-half of a flouring mill so utterly out of repair as to be almost useless. The share of the co-tenant was sold on execution, and defendants bid it in. While waiting for the 15 months to elapse, defendants made necessary repairs and improvements. Plaintiffs, who were judgment creditors, redeemed after the work had been done, and brought this action of partition, in which the court decided that no allowance should

be made to defendants for the improvements. *Held* error; that the rule which gives the shiftless tenant the benefit of the labor of his thrifty co-tenant will not prevail in a court of equity.

"SAME. A co-tenant asking aid of a court of equity for a partition against an owner who has made improvements upon the property is entitled to relief only upon condition that any equities thereby arising shall be taken into account."

Only Miss Ward appealed from the decree of the first trial (R. 125-126). All the respondents were not before the Territorial Court when it reversed the decree as to title to the improvements on the theory of a holdover tenancy.

32 Am. Jur. 799, s. 948:

"Covenants and terms of the original lease which are inconsistent with the new tenancy will not, however, govern the latter."

34 A.L.R. (Anno.) 806, to the same effect.

32 Am. Jur. 692, s. 814,

". . . a covenant to leave in repair, contained in a joint demise made by tenants in common, runs with the entire reversion only, and hence is not enforceable by the transferee of only one of the tenants in common, but must be sued upon by the representatives of all the tenants in common."

34 A.L.R. (Anno.) 795, same.

32 Am. Jur. 693, s. 814,

"A transfer by the lessor after the expiration of the term, though the lessee was at the time hold-

ing over, will not, it seems, carry the benefits of the tenant's covenants to redeliver at the expiration of the term, as it should in this connection be considered as having been broken at the time of the transfer."

Where there is a mutual understanding as to the tenant's occupancy, the new agreement takes the place of the presumption of a holding over (32 Am. Jur. 790, s. 936).

Negotiations for a new lease do not constitute a renewal or holding over under the old lease (32 Am. Jur. 781, s. 922).

The 1896 lease was a joint demise (R. 379, Ex. F).

In any case appellees or their predecessors in title were guilty of laches in claiming the improvements and structures (*De La Nux v. Houghtailing* (9 CCA), 269 F. 751, 755).

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6. AS AN ALTERNATIVE TO ERROR NO. 5 ABOVE, THE APPELLATE COURT ERRED IN NOT REVERSING THE DECREE OF SALE MADE BY THE TERRITORIAL COURT.

If the Appellate Court had felt itself at liberty to examine the law applicable to this case with the facts, it would have reversed the decree of sale made by the Territorial Court and would have affirmed the second decree of the Trial Court if for any reason its first decree were not affirmed.

The Trial Court went into details in its decision ascertaining the value of structures and improvements

by the amount they enhance the property and why partition in kind was practicable and equitable and not prejudicial (R. 183, 211). The trial judge criticized Miss Ward's testimony and appellees' case where they endeavored to arrive at a conclusion that the property had a value (including the nuisance value) of $327,000 (R. 213). The reference on that page to $237,000 is in error for $327,000, which is corrected on (R. 222). Miss Ward testified at a previous trial that she thought the property was worth $30,000 as shown above. The Trial Court said of her testimony "she testified, it seemed with her tongue in her cheek . . . Her opinion as to value was unreliable" (R. 207).

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7. THE DECREE OF SALE DEPRIVES PETITIONER OF ITS LAND WITHOUT DUE PROCESS OF LAW CONTRARY TO THE CONSTITUTION.

The Fifth Amendment of the Constitution provides that no person shall be deprived of his property without due process of law. This is made applicable to Hawaii by Act of April 30, 1900, C. 399, S. 5, 31 Stat. 141, amended (48 USCA, sec. 495 and supplement) *Robertson v. Pratt,* 13 Haw. 590, 599.

Property rights can be divested by judicial decision just as effectually as they can be divested by statute. Where the previous law is settled, and property rights are divested by judicial decision which departs from the adopted rules of law, it is contrary to the constitutional rights, and due process is denied. The Territorial Court had previously settled rules, and, in this case, it departed from them. Petitioner ac-

quired its property relying upon the old rules. *West v. American Tel. & Tel. Co.*, supra, 311 U. S. at 237, referring to state law, said:

> "State law is to be applied in the federal as well as the state courts."

Russell v. Todd, 309 U. S. 280, 287, supra, said that the rules to be adopted by federal courts

> "applies as well to rules established by judicial decision in the states as those established by statute. Erie R. Co. v. Tompkins, 304 U. S. 64 . . ."

Menges v. Dentler, 33 Pac. 495, 75 Am. Dec. 616, 618,

> "The law which gives character to a case, and by which it is to be decided . . . the law that is inherent in this case . . . if this law be changed or annulled, the case is changed, and justice denied, and due process of law violated."

It is said that the Constitution is infringed if "plain rights" have been ignored. *McGovern v. New York*, supra, 229 U. S. 363, 372.

Croston v. Male, 56 W. Va. 205, 49 S. E. 136, 137, referring to the partition statute, said:

> "The statute is an innovation upon the common law, taking away from the owner the right to keep his freehold, and converting his home into money. This must not be done except in cases of imperious necessity . . . So sacred is the right of property that to take it away from one man and to give it to another for private use, is beyond the power of the state itself, even upon payment of full compensation."

8. THE APPELLATE COURT ERRED IN NOT DECIDING THAT THE TRIAL COURT HAD JURISDICTION OF APPURTENANT WATER RIGHTS AND THAT IT CORRECTLY DECIDED THEM.

Rev. Laws of Hawaii, 1945, C. 208, sec. 10,218, defines "commissioner" as referring to the judge of the circuit court within which the property affected is situated.

> Sec. 10,219. "Jurisdiction. The circuit judges shall have jurisdiction to hear and determine all controversies respecting . . . water rights, as in this chapter provided."
>
> Sec. 10,220. "It shall be the duty of the judges within their respective circuits to hear and determine all controversies respecting . . . water rights, between private individuals, or between private individuals and the Territory. Any person interested, or the Territory, may apply for the settlement of any rights involved hereunder. . . ."

Waterhouse Tr. Co. v. King, 33 Haw. 1, 17, citing with approval from an earlier Hawaii case, states:

> " 'There must be an explicit expression of the intention of the legislature to make the jurisdiction exclusive. We do not find any such intention in the water rights commission statute. It is affirmative only and does not destroy the jurisdiction in equity. . . . We, therefore, hold that the jurisdiction in equity, in a proper case for equity, exists concurrently with the jurisdiction of the commissioners where controversies respecting water rights are involved.' "
>
> *Ideta v. Kuba,* 22 Haw. 28, 30.

No claim to water rights was raised by the amended petition (R. 170 et seq.), or by the original petition (R. 5, et seq.). Jurisdiction of the equity court over the water rights was invoked by the appellees' answers (R. 40, par. 13; R. 46, par. 13; R. 52, par. 13). The fact that they were tried and decided (R. 219) contrary to the appellees' contentions, does not oust the equity court's jurisdiction.

The Territorial Court remanded the case to the Trial Court with instructions to consider water rights (R. 159-161). These instructions were followed (R. 219). It was error for the Territorial Court to reverse (R. 289) the Trial Court's decree determining water rights, based upon the evidence (R. 542, 562, 567-569, 590-600, 368-376).

The Land Commission Award for this land (Ex. 13, R. 368) was issued under the Hawaii statute creating a Board of Land Commissioners of 1845, which had power to settle water privileges (sec. 7).

Sec. 13 provides, "The titles of all lands claimed of the Hawaiian Government anterior to the passage of this act, upon being confirmed as aforesaid, in whole or in part, by the Board of Commissioners, shall be deemed to be forever settled, as awarded, unless appeal be taken to the Supreme Court and all claims rejected by said Board unless appeal be taken as aforesaid, shall be deemed to be forever barred . . ."

Lewers & Cooke v. Atcherly, 222 U. S. 285, 294-295, ". . . The real foundation of settled titles seems to have been the establishment of the land commission in 1845. Thurston v. Bishop, 7 Haw. 421,

> 428. When the supreme court of Hawaii repeats what it has been saying for many years, that the decisions of that board could not be attacked except by a direct appeal to the supreme court provided by law, no imperfect analogy, such as that of patents issued by our Land Department, is sufficient to overthrow the tradition, fortified as it is by logic and good sense."

In Hawaiian "kula" means dry, and "kalo" means wet or taro land. In the description of this land in the Land Commission Award, the only wet land is referred to as part of Lot 5. It says "this is a claim for a piece of kula and kalo land" (R. 374). The L. C. Award shows that none of the other lands except Lot 5, had any appurtenant water rights, the testimony of the witnesses is the same (R. 370, 427, 436, 530, 568, 600). The trial judge found that the only land having appurtenant water rights was 2.5 acres in Lot 5 (R. 219). The testimony shows that petitioner obtains its water for irrigating the lower lands around Lot 1 by pumping, and from wells (R. 530). Lot 1 has no water rights (R. 530, 562, 593). There would not be much of a lift for water pumped out of Lot 1 (R. 563). The Territorial Court conceded that the evidence was insufficient to establish a water right for any other land than 2.5 acres of Lot 5, and then said it did not follow that the house lot (Lot 1) was not entitled to water from the stream for domestic use at the time of the award (R. 283). There is no foundation for this statement because the award in describing Lot 1, does not mention taro land or water rights (R. 368); and there is no evidence that it had

water rights, but there was evidence that water could be obtained from a well. The trial judge's decision was correct.

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9. THE DECREE OF SALE ERRONEOUSLY AWARDS TO COTENANTS OTHER THAN PETITIONER, A NUISANCE VALUE IN ADDITION TO THE VALUE OF THE PROPERTY.

This ground has been discussed under other headings and authorities have been cited.

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10. THE APPELLATE COURT IN A PREVIOUS CASE RULED THAT WHETHER OR NOT PROPERTY COULD BE PARTITIONED IN KIND IS A QUESTION OF FACT, BUT IN THIS CASE RULED THAT IT WAS A QUESTION OF LAW AND FACT.

For this reason the writ of certiorari should be granted to determine which ruling is correct.

In *Manley v. Boone,* 159 F. 633, upon appeal from the District Court of Alaska to the Ninth Circuit Court of Appeals in a partition suit, the statute provided (p. 636)—

> " 'That if it be alleged in the complaint, and established by evidence, . . . that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, . . .'
>
> ". . . a careful consideration of the record satisfies us that we would not be justified in interfering with the finding of the court below to the effect that the property in question can be partitioned without great prejudice to the parties in interest. . . . Still, not only may such property be

divided among the owners in proportion to their respective interests, but, according to the terms of the statute under which the present proceedings were taken, must be so divided unless it be made to appear that a partition thereof cannot be made without great prejudice to the owners. *That is a question of fact* upon which the evidence in the present case is very conflicting, and we think no good reason appears why the conclusion of the trial court upon it should be disturbed." (Authority).

In the instant case the Appellate Court said:

". . . but the solution of that problem involved more than the determination of naked question of fact. Involved also was the legal and equitable principles appertaining to the facts."

CONCLUSION.

It is respectfully submitted that this Court should review and reverse the holding in the *Waialua v. Christian* case, supra, to the extent that it practically makes the decision of the Territorial Court final where such decision does not affect the Constitution or a Territorial statute. The federal statute makes the decision appealable. The Territorial Court is a Federal court. The Appellate Court is the superior court and in order to properly hear an appeal should review the findings of fact and law, and see that they conform to the evidence, and to the previously established law, and more especially so in equity where general principles of equity are made applicable by the partition statute. But for the one feature of this case, that is,

giving the co-tenants a share of the nuisance value of the property in addition to a share of the fair value of the property itself, the Territorial Court would never have reversed the decrees of the Trial Court awarding partition in kind. And if this ruling is wrong, which is demonstrated beyond doubt by the cases above cited and the evidence, clearly the Territorial Court's decision should be reviewed and reversed. The decree of sale, departing as it does from settled law, denies the petitioner of its property rights without due process of law under the Constitution. The equity court had jurisdiction of the water rights and they should not now be left open by the Territorial Court's final decision. The Appellate Court has ruled one way in one case, and another way in this case. Its rulings should be consistent and the error corrected.

It is respectfully submitted that the judgment of the Appellate Court and of the Territorial Court should be reversed and the decree of the circuit judge at the first, and if not at the first then at the second trial, should be affirmed.

Dated at Honolulu, T. H., January 16, 1947.

Respectfully submitted,
URBAN E. WILD,
Counsel for Petitioner.

SMITH, WILD, BEEBE & CADES,
Of Counsel.

(Appendix A Follows.)

Appendix A

Revised Laws of Hawaii 1945

Chapter 304, Partition of Real Estate.

"Sec. 12450. Suits for partition. When two or more persons hold or are in possession of real property as joint tenants or as tenants in common, in which one or more of them have an estate in fee, or a life estate in possession, a suit in equity may be brought by any one or more of them in the circuit court of the circuit in which the property is situated, for a partition of the property, according to the respective rights of the parties interested therein, and for a sale of the same or a part thereof if it shall appear that a partition cannot be made without great prejudice to the owner. The circuit judges of the several circuit courts, sitting at chambers in equity within their respective jurisdictions, shall have power, in any suit for partition, to proceed according to the usual practice of courts of equity in cases of partition, and according to the provisions of this chapter in enlargement thereof. The rights of the several parties petitioners as well as respondents, may be put in issue and tried and determined in the suit as in this chapter provided. (L. 1923, c. 178, s. 1; R. L. 1925, s. 2761; am. L. 1929, c. 170, s. 1; R. L. 1935, s. 4740.)

"Sec. 12451. Necessary parties; intervenors; unknown owners. Every person having any legal estate in the property, in fee or as a tenant for life or for years, or any vested estate in dower or by curtesy, or having any vested or contingent legal estate or interest in reversion or re-

mainder, as far as known to the petitioner, or in any mortgage, on record, upon all or any part of the property, shall be made parties to the suit. The petitioner may at his election also join as parties any person or persons having or claiming to have any equitable estate or interest in any part of the property or any lien or incumbrance which attaches to all or any part thereof.

"Any person having or claiming to have any legal or equitable estate, right or interest in the property or any part thereof, or any lien or incumbrance upon or affecting the property in whole or in part, or any inchoate right of dower, not joined as a party in the petition as filed, may become a party by appearing and filing answer in the suit, or otherwise by intervention as the court may allow, and may by appropriate pleading set forth the estate, right, title or interest claimed in the premises, or lien or incumbrance asserted against the same.

"All persons interested in any manner or who may claim any interest in the premises whose names are unknown to the petitioner, may be made parties to the suit by the name and description of unknown owners and claimants, and may be designated by fictitious names, and when their true names shall become known the same may be inserted as though correctly stated in the first instance. (L. 1923, c. 178, s. 2; R. L. 1925, s. 2762; am. L. 1929, c. 83, s. 1; R. L. 1935, s. 4741.)"

Sec. 12452. Petition; verification. This section provides that the petition shall describe the property and state the title and rights of all parties interested as

known to petitioner, for joining persons whose interests are unknown by fictitious names, and for verifying the petition.

"Sec. 12453. Pleadings; admissions; issues: no abatement. Each party shall allege the source or derivation and devolution of his title, right, interest or claim. The answers of the respondents must be verified and must state, among other things, the precise nature and extent of their respective interests or claims. When denials are made, the same shall be specific. No answer of general denial shall be allowed. All matters, set forth or claimed in any pleading with respect to the estate, title, right, interest or claim of any party filing the same, which are not inconsistent with any other pleading, shall be taken as admitted by all parties appearing in the suit, and proof thereof shall not be necessary unless required by the court.

"Whenever there is any conflict between the claims of the petitioner and any respondent, or between the claims of any respondents, as disclosed by their respective pleadings, the same shall, without further pleading, be taken as framing an issue; provided that any party may by leave of court file any additional pleading, and the court may on its own motion require any party to further plead with respect to any claim or allegation by any other party. No plea in abatement shall be received in any suit, nor shall any suit abate by reason of the death of any party, but if any suggestion of death of any party shall be made to the court, the court shall upon ascertainment of the identity of the heirs or devisees of such decedent, order them joined as

parties. (L. 1923, c. 178, s. 4; R. L. 1925, s. 2764; R. L. 1935, s. 4743.)"

Sec. 12454. Summons, service, publication. This section provides that the summons shall be directed to all persons named in the petition and all persons known or unknown having any claim on the property, and for service of summons upon all parties and for giving notice of the summons by publication in the newspaper, and by posting on the property and that the court may then proceed to act as though all unknown or unserved parties had been duly served with the summons.

"Sec. 12455. Lis pendens. * * *"

"Sec. 12456. Powers of the court. The court shall have power to hear, investigate and determine any and all questions of conflicting or controverted titles, or claims either as to the whole of the property or as to any share or interest therein, either with or without the intervention of a jury, as hereinafter provided; to remove clouds upon the title of the property or any share or interest therein; to vest titles by decrees, without the form or necessity of conveyance by minors or unknown or absent owners; to cause the property to be equitably divided between the parties according to their respective proportionate interests therein, as the parties shall agree, or by the drawing of lots; to set apart any particular portion or portions of land to any particular party or parties who by prior occupation or improvement or otherwise may be equitably entitled thereto, and make any proper adjustment or equalization thereof by the sale of other portions

and the application of the proceeds for such purpose, or as a condition of any such particular allotment to require payment by such parties of any value of the portion so set apart to them in excess of their proportionate interest in the value of the whole property; to divide and allot portions of the premises to some or all of the parties and order a sale of the remainder, or to sell the whole thereof, where for any reason the partition thereof in kind would be impracticable in whole or in part or be greatly prejudicial to the parties interested, and by decree or decrees to invest the purchaser or purchasers with title to any property sold, and use the proceeds to equalize the general partition. When partition of two or more separate tracts or parcels of land is sought, the whole share of any party in all of them may be set apart to him in any one or more of the tracts or parcels. If the land is situated in the City of Honolulu, as defined in section 6502, or is within any other area of the city and county to which the master plan of said city has been extended, any plan for a subdivision thereof as defined in section 6638 shall, before approval by the court, be subject to approval by the city planning commission in like manner as subdivisions under said section 6638. (L. 1923, c. 178, s. 7; R. L. 1925, s. 2767; R. L. 1935, s. 4746; am. L. 1939, c. 242, s. 9.)"

"Sec. 12457. Trial of title. * * * "

"Sec. 12458. Unknown and unserved owners. * * * "

"Sec. 12459. Allotments for shares under unproved ownership. * * * "

"Sec. 12460. Liens and incumbrances. * * * "

"Sec. 12461. Estates for life and years, and contingent estates. * * * "

"Sec. 12462. Commissioners in partition. The court shall have power in its discretion to appoint a commissioner or commissioners to act under the directions and subject to the approval of the court, and may invest them with power to investigate and report to the court as to the practicability of partition of the property in whole or in part, and where partition is deemed practicable to prepare a plan for division of the property into lots or parcels, including provision for any necessary roads or rights of way, and making of maps and surveys, and for appraisements, or any other matters referred to them by the court, with their recommendations as to the division or allotment of the parcels among the parties interested. Such commissioners shall have power, as and when directed by the court, to make deeds of partition or of sale of the property. Before making any sale the commissioners shall each give security approved by the court conditioned for the faithful discharge of their duties. Upon the filing of any report by commissioners in partition the parties may have such time as the court may allow to file any objections thereto or to any part thereof, and if any objections are filed the court shall upon notice hear and determine the same. (L. 1923, c. 178, s. 13; R. L. 1925, s. 2773; R. L. 1935, s. 4752.)

"Sec. 12463. Sales; auction, notice. * * *"

"Sec. 12464. Conveyances and payments in partition; possession and guaranty. * * * "

"Sec. 12465. Default. * * * "

"Sec. 12466. Costs. * * * "

ADMISSION OF SERVICE.

Service of a copy of the foregoing Petition for Writ of Certiorari and Brief in Support Thereof, and of the printed record in the Supreme Court of the United States is hereby admitted this 16th day of January, 1947.

Phil Cass,
Counsel for Victoria Ward, Ltd.

CERTIFICATE OF MAILING.

I hereby certify that I mailed at Honolulu, T. H., postage prepaid, a copy of the foregoing Petition for Writ of Certiorari and Brief in Support Thereof, together with the additional printed pages of the record added by the United States Circuit Court of Appeals for the Ninth Circuit, in the above case, for filing with the Supreme Court of the United States upon said Writ of Certiorari, addressed to Miss Marguerite K. Ashford, Kaunakakai, Molokai, T. H., as Miss Ashford no longer maintains an office in Honolulu, T. H.

Dated: Honolulu, T. H., January 16, 1947.

Harry Edmondson,
Of Counsel.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 973

PIONEER MILL COMPANY, LIMITED (a Hawaiian corporation),
Petitioner-Appellant,

vs.

VICTORIA WARD, LTD., and VICTORIA KATHLEEN WARD,
and
Respondents-Appellees,

THOMAS DUNCAN (alias Thomas Cokett), ABRAHAM KELUKUMOKU KUKEA (alias Ephraim Kelukumoku Kukea), SOLOMON KAHOLOMOANI KUKEA, JOSEPH KALA KUKEA, JAMES KALEIWAHEA, ARTHUR KALEIWAHEA, LOUIS KALEIWAHEA, ELIZA KALEIWAHEA, VIOLET KALEIWAHEA, IRENE KALEIWAHEA, ROSALINE KALEIWAHEA, ALBERT JOSEPH KALEIWAHEA, TERRITORY OF HAWAII, COUNTY OF MAUI, FIRST DOE, SECOND DOE, and THIRD DOE, and all other persons although unknown, having or claiming to have any legal or equitable estate, right, title or interest of any nature in the land hereinafter described, or any part thereof, or any lien or claim with respect thereto. *Respondents.*

REPLY OF RESPONDENTS, VICTORIA WARD, LTD. AND VICTORIA KATHLEEN WARD, TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ROBERT M. SEARLS,
705 Standard Oil Building, San Francisco 4, California,
Attorney for Respondents, Victoria Ward, Ltd. and Victoria Kathleen Ward.

PHIL CASS,
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WILLARD LEE POPE,
705 Standard Oil Building, San Francisco 4, California,
Of Counsel.

Subject Index

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Statutes

In the Supreme Court
OF THE
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No. 973

PIONEER MILL COMPANY, LIMITED (a Hawaiian corporation),
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vs.

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Respondents-Appellees,

and

THOMAS DUNCAN, et al.,
Respondents.

REPLY OF RESPONDENTS,
VICTORIA WARD, LTD. AND VICTORIA KATHLEEN WARD,
TO PETITION FOR WRIT OF CERTIORARI
AND BRIEF IN SUPPORT THEREOF.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Victoria Ward, Ltd. and Victoria Kathleen Ward, named as respondents and appellees in the above entitled Petition, and hereinafter referred to as "respondents", respectfully show to the Court the following reasons for dismissing or denying the Petition for Writ of Ceriorari in this case:

SECTION I.

GROUNDS FOR DISMISSAL.

The Petition as filed does not comply with either Rule 38, Subdivision 5 (b) of this Court, or with Rule 38, Subdivision (2), which incorporates by reference Rule 12, Paragraph 1. Respondents specify the following defects in the Petition under said rules:

(1) The jurisdictional statement contained in Paragraph B, page 14 of the Petition embodies merely a statement of the date at which the decision of the Appellate Court was entered, the date at which the petition for a rehearing was denied, and the date at which the right to file a Petition for certiorari expired. Rule 12, Paragraph 1, of this Court, which is incorporated by reference in Rule 38, Paragraph 2, requires in part that the statement disclose the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question, and as a part of said statement shall refer distinctly,

(a) to the statutory provision believed to sustain the jurisdiction;

(b) to the statute of the State or statute or treaty of the United States, the validity of which is involved; and also shall specify the stage in the proceedings of the Court of first instance, and in the Appellate Court in which the federal questions sought to be reviewed were raised, and the method of raising them, and the way in which they were passed upon by the Court, with quotations of specific portions of the record, including the rulings and assignments of error.

While in Rule 12 these matters are related solely to appeals from state Courts, under Rule 38, Paragraph 2, they are made applicable to proceedings for *certiorari* to all Courts.

The reason for the omission of these statements is quite plain upon the review of the record. Apart from the general constitutional authority of this Court to grant certiorari in any case if it desires to do so, there is nothing in the record which shows that the petitioner could comply with the rules which the Court has set up to govern its exercise of this authority. The validity of no statute of the Territory of Hawaii or of the United States is involved. The constitutional questions raised in the Petition for certiorari never were raised below except upon petition for a rehearing in the Circuit Court of Appeals. The Court will search the records and briefs in vain to find that the attention of the Supreme Court of Hawaii or of the Circuit Court of Appeals prior to the petition for a rehearing was ever directed by petitioner to any constitutional defects in the judgment either under the

Constitution of the United States or under the Territorial Act creating the Territory of Hawaii.

In *McCullough v. Kammerer Corporation,* 323 U. S. 327, 328, 89 L. Ed. 273, 274, this Court granted certiorari to the Ninth Circuit Court of Appeals to review an affirmance of a District Court judgment. Upon finding that the question upon which certiorari was granted had not been raised below, the Court said:

> "Thus the only question for which we granted certiorari is one not properly raised, litigated or passed upon below. * * * The grounds asserted for the allowance of certiorari are inadequately supported by the record, and the writ is therefore dismissed."

(2) The Petition does not show any conflict of decision between the Circuit Court of Appeals for the Ninth Circuit with any other decision of any other circuit in the same matter. It does not show that the Circuit Court of Appeals has decided an important question of local law in any way probably in conflict with the applicable local decisions; nor that it has decided an important question of federal law which has not been settled by this Court, or has decided any vital question in a way probably in conflict with parallel decisions of this Court. Indeed, one of the principal claims made in the Petition (p. 27) is that the Circuit Court erroneously *followed* the decision of this Court in the case of *Waialua Company v. Christian,* 305 U. S. 91, 109, 83 L. Ed. 60. This claim appears to be based on the novel contention that the Hawaiian Courts are really federal Courts because their judges are appointed by the President and not elected by the

citizens of Hawaii and that therefore the rule attaching great weight to the decision of a State Court of last resort in construing the statutes of its own State should not be applied to a territorial Court. But the Act of Congress creating the Territory of Hawaii (Act of April 30, 1900, Ch. 339, Sec. 80; 48 U. S. Code, Sec. 631) stated:

> "And until the *legislature* shall otherwise provide, the laws of *Hawaii* in force prior to April 30, 1900, concerning the several courts and their jurisdiction shall continue in force except as herein otherwise provided."

Thus it is clear that the territorial Courts derive their authority from the territorial legislature and not from Congress.

See, also,

Kealoha v. Castle, 210 U. S. 149, 154, 52 L. Ed. 998, 1001.

(3) The Petition does not show that the Circuit Court departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower Court to such an extent as would call for an exercise of this Court's power of supervision.

In *Magnum Import Company v. De Spoturno Coty,* 262 U. S. 159, 163, 67 L. Ed. 922, 924, this Court held:

> "* * * The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes; first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public

> interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

(4) The Petition does not set forth any question under Rule 38, Paragraph 5 (c), which relates entirely to a construction or application of the Constitution, treaty, and statutes of the United States.

Upon the foregoing grounds we respectfully submit that the Petition should be dismissed.

SECTION II.

REPLY TO PETITION ON ITS MERITS.

1. PETITIONER'S SPECIFICATIONS NOS. 1 TO 7, INCL. (Petn. pp. 20-21.)

The Petition contains a long and involved statement of facts which we shall not presume to argue in this reply. The sum and substance of the petitioner's complaint is that it applied, as the undivided owner of certain real estate on the island of Maui in the Territory of Hawaii, for a decree of partition in kind between itself and the respondents; that on two separate trials the Hawaiian Territorial trial court awarded a decree of partition in kind; that upon two separate appeals the Supreme Court of Hawaii determined (R. 160, 280-289), as a mixed question of law and fact, that partition in kind was inequitable and

unfair to the respondents, and, in the latter decision, ordered in lieu thereof a sale of the jointly owned property and division of the proceeds. From the final decision of the Supreme Court of Hawaii, which incorporated by reference some of the holdings on its former decision (R. 289), the petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit. That Court, after considering the voluminous briefs filed, determined that the only questions involved were those of local law in Hawaii and declined to interfere with the decision of the Territorial Supreme Court (R. 639-640), relying on the rule laid down by this Court in *Waialua v. Christian, supra.* (R. 639.)

In this situation petitioner asserts that the Circuit Court abandoned its functions and failed to rule on all of the points raised on appeal to the Territorial Supreme Court (Specifications Nos. 1 to 6, incl., Petn. p. 20), and that because that Court ordered a sale in the partition proceedings in lieu of the partition in kind which the petitioner asked for in invoking the proceedings, it is being deprived of its property without due process of law. (Specification No. 7, Petn. p. 21.) In other words, because the Supreme Court of Hawaii, in a case instituted by petitioner itself, refused to sanction a partition in kind which that Court thought would be inequitable to the respondents, and instead decreed that the property be sold and the proceeds divided, this constitutes a taking within the inhibition of the Fifth Amendment of the United States Constitution.

If petitioner's position is correct, then every litigant who instigates a law suit invoking a particular remedy would be entitled to raise a constitutional objection to a Court's decree if it denied the remedy sought or awarded a different remedy from the one that was sought. We think no citation of authority is necessary to demonstrate the absurdity of this contention.

2. WERE THERE ANY EQUITIES IN PETITIONER'S CASE WHICH JUSTIFY A REVIEW BY THIS COURT?

The principal objection made to the sale in partition is that the Supreme Court decreed that the sale value should include the value of certain improvements, namely, a water tunnel, certain buildings, and a railroad track constructed in and across the jointly owned property by the petitioner, and at petitioner's expense. (R. 305-6.) The Petition, however, significantly omits the basis for the ruling of the Supreme Court of Hawaii in this respect. We allude briefly to the record in this connection.

Petitioner entered into a written leasing agreement with the respondents and their predecessors in interest on August 31, 1896, for a term of twenty years, upon an agreed rental. This lease contained a covenant by the petitioner as lessee (R. 380), "that at the end or earlier determination of this term to peaceably quit and surrender the demised premises *with the improvements* to said Lessors or their representatives".

Upon expiration of this lease in 1916 petitioner continued in possession of the demised premises and continued to pay rent therefor from time to time.

(R. 458-465.) Petitioner without taking the trouble to acquire all of the undivided interests held by respondents in various subdivisions of the tract on which the petitioner was conducting a large sugar cane operation, went ahead and diverted all of the water from the stream which bordered some of these lands, through a tunnel which it built beneath the mountain range on Maui, and beneath some of the lands sought to be partitioned, and conducted the water to various portions of its holdings for irrigation purposes. It also built a railroad spur across some of the lands sought to be partitioned. (R. 78.) With the withdrawal of the water from the stream and consequent inability to irrigate many of the little riparian kuleanas upon which a number of the descendants of the original grantee of the property had dwelt, these tiny farms were abandoned as unfit for the taro growing which had constituted the previous native utility. (R. 614-615.) No consideration was paid any of the respondent land owners for this deprivation of water rights which, under the Hawaiian law, were originally appurtenant to all of these lands. The petitioner and its subsidiary corporation just took a chance that they could follow this course of procedure without interference from the persons who owned these lands.

The respondents, however, refused to acquiesce in any of these matters, and refused to sell their interests, in order to preserve a residuum of their ancestral inheritance. The lands in question had been originally granted in 1849 by King Kamehameha III to John Previer (R. 368), and that grant under the Hawaiian

law carried a water right with it. (R. 284.) Over the years it had passed into the hands of many descendants, some of whom had sold lots or undivided interests in lots to petitioner or its subsidiary, Lahaina Agricultural Company. (R. 153.) The respondents in the instant case refused to sell at prices offered. (R. 477.) Respondent Victoria Kathleen Ward, in opposing the partition proceedings, offered and demonstrated her ability to bid for the acquisition of all of the property that was subject to partition, in a desire to regain control of her ancestral estate. (R. 479, 487.) She was one of the descendants of John Previer, the original grantee. (R. 603-604.)

In this situation the question arises as to whether there is any equity in the petitioner's position. By its own contract it agreed that improvements made on the leasehold should belong to the lessor. This covenant in the lease was properly held by the Hawaiian Supreme Court to be a continuing enforceable covenant when petitioner held over and paid rent after expiration of the original term of the lease. That ruling was in conformity with the generally established and accepted rule that, in holding over, the tenancy is presumed to be subject to the terms, conditions and covenants of the original lease.

3 *Thompson, Real Property* (perm. ed.), Sec. 1034, p. 33;

2 *Taylor's Landlord and Tenant* (9th ed.), Sec. 525;

Jones, Landlord and Tenant, Sec. 202;

2 *Tiffany, Landlord and Tenant,* 1470-1471, 1479;

A. H. Fetting Mfg. Jewelry Co. v. Waltz, 160 Md. 50, 55, 152 Atl. 434, 435-436;
Peterson v. Dose, 124 Ore. 30, 33, 34, 263 Pac. 888, 889;
Brewer v. Kapp, 1 Pick. (Mass.) 332, 334;
Conway v. Starkweather, 1 Denio (N.Y.) 113, 115;
Wolffe v. Wolffe Bro., 69 Ala. 549, 553;
Schuyler v. Smith, 51 N. Y. 309, 313;
Prickett v. Ritter, 16 Ill. 96, 97;
Bacon v. Brown, 9 Conn. 334, 341.

The determination was also supported by at least one earlier decision of the Hawaiian Court.

Parke v. Robinson, 6 Haw. 666, 667.

The fact that the rental paid by petitioner was subsequently changed in 1926, long after the tunnel was built, did not alter the other obligations of the lease, including the Lessors' right to improvements on expiration of the lease.

3 *Thompson, Real Property* (perm. ed.), Sec. 1035, pp. 37, 38;
Cramer v. Baugher, 130 Md. 212, 215-216, 100 Atl. 507, 509.

Therefore, said the Supreme Court of Hawaii, in effect, even though the petitioner would have been equitably entitled to have set aside to it lands on which it had placed improvements if no other circumstances existed, the fact that it had used these improvements to deprive the respondents of their share of the waters of Honokowai stream, and the fact that it had origin-

ally agreed in writing that improvements placed on lands should belong to Lessors and had continued in possession of the lands under an implied extension of that covenant, changes the equities entirely. Respondents had an undivided interest in these improvements as a matter of contract. Two decrees of the trial Court deprived them of any title to or remuneration for the improvements and any restoration of water rights or compensation therefor.

In such circumstances, the Territorial Supreme Court held that the equitable rights of all of the parties could not be preserved by a partition in kind of the lands since much of the value of these parcels had been transferred to other properties of the petitioner through the diversion of water. Also, in view of the differences in fertility and accessibility of the separate parcels which the trial Courts had allocated to the respective co-owners, the Supreme Court found that justice to all parties would best be served by a sale and distribution of the proceeds. (R. 293.) Petitioner could buy the lands and improvements at the sale if it so desired; the fair value could be determined by competitive bidding; and in view of its ownership of seven-eighths of the title to the property it would only have to account to the ~~petitioner~~ Respondents and other undivided interest holders for one-eighth of the proceeds.

This Court held in *Waialua Agricultural Co. v. Christian,* 305 U. S. 91, 109, 83 L. Ed. 60, 72:

> "* * * In so far as the decisions of the Supreme Court of Hawaii are in conformity with the Con-

> stitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory. Unless there is clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii."

The suggestion in the Petition (p. 43) that the case just mentioned held that partition in kind should be made setting apart to a tenant in common the portion of the real estate innocently improved by him (headnote 8) is clearly inapplicable:

(1) because the Court merely used the rule as an illustration of what may be done to avoid inequities, no partition whatever being involved in that case;

(2) because the Hawaiian Supreme Court in the present case found several factual reasons why such procedure would be wholly inequitable.

Far from awarding the respondents a "nuisance value" for their holdings, as claimed by petitioner in Specification No. 9, the judgment appealed from merely holds with manifest justice that petitioner cannot ignore its contractual agreement that the improvements are a part of the realty, and convert a partition suit into an eminent domain proceeding for its private benefit. That in effect is what it has been trying to do throughout this long period of litigation.

SECTION III.

REPLY TO OTHER POINTS IN PETITION.

1. SPECIFICATION NO. 3. (PETN. p. 20.) FAILURE OF APPELLATE COURT TO EXAMINE THE FIRST DECREE OF THE SUPREME COURT OF HAWAII.

There was no need for a separate examination of the first decree because its essential rulings with respect to ownership of the improvements were incorporated in the final decree of the Supreme Court, which said (R. 289):

> "Hence, the petitioner's claim of title to improvements was settled by our opinion on the former appeal."

And again, on the same page:

> "We conclude that the decree as to water rights and title to the railroad tunnel rights of way, and ordering partition in kind, should be reversed and a decree entered by this court ordering a sale of the property and a division of the proceeds among the co-tenants according to their respective interests in the property."

The decree drawn pursuant to this opinion carries these instructions into effect. (R. 305-306.) Therefore, the Circuit Court of Appeals in examining the final decrees passed on all of the alleged errors in both decisions in the Supreme Court of Hawaii.

2. SPECIFICATION NO. 8. (PETN. p. 21.) HERE THE POINT IS RAISED THAT THE CIRCUIT COURT OF APPEALS ERRED IN NOT DECIDING THAT THE TRIAL COURT HAD JURISDICTION OF WATER RIGHTS APPURTENANT TO THE LAND, AND HAD CORRECTLY ADJUDICATED SUCH RIGHTS.

What the Supreme Court of Hawaii held (R. 286) was that although there were some one hundred and twenty kuleanas abutting on Honokowai stream below petitioner's diversion dam, some of those kuleanas were owned by persons not parties to the suit, and that such owners would not be bound by a decree between the parties purporting to settle the rights to the waters of Honokowai stream. The Supreme Court ordered (R. 286):

> "The decree purporting to settle the water rights is accordingly reversed, to the end that the issue be left open for adjudication in a proper proceeding, if such a proceeding should be instituted."

The decree of the Supreme Court from which the appeal is taken is entirely silent as to the ultimate disposal of water rights. Hence there is nothing before this Court to adjudicate under Specification No. 8.

3. SPECIFICATION NO. 10. (PETN. p. 22.) IT IS HERE ALLEGED THAT THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE QUESTION AS TO WHETHER THE PROPERTY IN THIS CASE COULD BE PARTITIONED IN KIND WAS A QUESTION OF LAW AND FACT.

This holding is alleged to be contrary to the decision of the same Circuit Court in *Manley v. Boone*, 159 Fed. 633 (C.C.A. 9—1908), involving an appeal from a par-

tition decree of the District Court of Alaska. An examination of that decision reveals that the questions there involved were entirely questions of fact, and the Appellate Court properly upheld the trial Court's findings on disputed evidence. In the case at bar, as heretofore pointed out, the legal questions as to the effect of petitioner's contractual agreement in the lease of 1896 and the hold-over tenancy thereafter that improvements should revert to the Lessors, the legal question as to the effect on values of the diversion of water from Honokowai stream without the authority of the owners entitled thereto—some of whom are respondents here—are all interwoven with the factual question as to the partibility or inpartibility of the land and improvements made thereon by the petitioner. Therefore there is no divergence by the Appellate Court from its prior rulings such as might justify a review by the United States Supreme Court. Furthermore, the Supreme Court of Hawaii is empowered by the laws of that Territory to review the entire record in equity cases and to make its own findings of fact.

Rev. Laws of Hawaii, 1945, Sec. 9505, provides as follows:

> "In case of appeal to the Supreme Court from a decision, judgment, order or decree of a circuit judge in chambers, the Supreme Court shall have power to review, reverse, affirm, amend, modify or remand for new hearing in chambers, such decision, judgment, order or decree in whole or in part, and as to any or all of the parties."

This section (which is identical with Sec. 3503, R. L. 1935) was interpreted by the Supreme Court of Hawaii as follows:

> "That this Court on an equity appeal will review the entire record before it and make its own findings of fact as well as rulings of law is authorized by Section 3503, R. L. 1935. (See *Estate of Isenberg,* 28 Haw. 590; *Bradbury v. Bradbury,* 29 Haw. 638; and *Wilder v. Pinkham,* 23 Haw. 571.)"
>
> *Mfgrs. Life Ins. Co. v. von Hamm-Young,* 34 Haw. 288, 303.

See also to like effect:

Wery v. Pacific Trust Co., 33 Haw. 701, 724;
Robinson v. McWayne, 35 Haw. 689, 739;
McCandless v. Castle, 25 Haw. 22, 23.

The other assignments raised by petitioner have been grouped and answered under Section II of this reply.

We conclude that the Supreme Court of Hawaii, acting under the authority of the local statutes, has correctly and conclusively decided certain questions of law and fact; that such decision has involved no manifest injustice to petitioner and certainly no judicial questions of great public importance; that the Circuit Court of Appeals has correctly refused to reverse the decision on questions of local law in Hawaii, and has correctly abided by the rule laid down by this Court in the *Waialua v. Christian* case, *supra;* that no constitutional questions are involved

and none were ever suggested by the petitioner prior to the filing of petition for rehearing in the Circuit Court of Appeals; that under these circumstances the Petition should be either dismissed or denied.

Dated, San Francisco, California,
February 10, 1947.

Respectfully submitted,
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